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Transaction ID 23900180
Case No. 2742-VCN

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

WEST WILLOW-BAY COURT, LLC,	:	
	:	
Plaintiff,	:	
	:	
v.	:	**C.A. No. 2742-VCN**
	:	
ROBINO-BAY COURT PLAZA, LLC and ROBINO-BAY COURT PAD, LLC,	:	
	:	
	:	
Defendants.	:	

MEMORANDUM OPINION

Date Submitted: May 20, 2008
Date Decided: February 23, 2009

Peter J. Walsh, Jr., Esquire of Potter Anderson & Corroon LLP, Wilmington, Delaware; Lewis S. Wiener, Esquire of Sutherland Asbill & Brennan LLP, Washington, DC, Attorneys for Plaintiff.

Peter B. Ladig, Esquire and Stephen B. Brauerman, Esquire of Bayard, P.A., Wilmington, Delaware, Attorneys for Defendants.

NOBLE, Vice Chancellor

I. INTRODUCTION

Plaintiff West Willow-Bay Court, LLC ("West Willow") commenced this action against Defendants Robino-Bay Court Plaza, LLC and Robino-Bay Court PAD, LLC (collectively, "Robino"), alleging that Robino had failed to perform as required under a purchase agreement (the "Purchase Agreement")[1] by which West Willow would acquire a pad site (the "Property") in the Bay Court Plaza Shopping Center, located in Dover, Delaware and owned by Robino; West Willow intended to lease the Property to Wawa, Inc. ("Wawa") for the development of a Wawa convenience store with gasoline service. The Court resolved the merits of the parties' contractual dispute in a Memorandum Opinion[2] which held that Robino had failed to secure a third party tenant's consent (the "Consent") in breach of the Purchase Agreement. That failure, which resulted from questions as to whether Wawa's proposed use was allowed on the Property, frustrated West Willow's expectations and effectively precluded consummation of the transaction. The Court declined to order specific performance, and instead the litigation proceeded to a damages phase. This post-trial memorandum opinion establishes the

[1] JX.

[2] *West Willow-Bay Court, LLC v. Robino-Bay Court Plaza, LLC*, 2007 WL 3317551 (Del. Ch. Nov. 2, 2007). The underlying facts are set forth more fully in the Memorandum Opinion and will not be rehashed in any detail here.

appropriate damages award and also resolves the parties' debate over whether West Willow should be awarded its reasonable attorneys' fees under the Purchase Agreement.

II. BACKGROUND

A. *The Underlying Facts*

West Willow entered the Purchase Agreement intending to lease the Property to Wawa, a fact of which Robino was aware.[3] According to West Willow's principal, Thomas B. McKee, absent the prospect of leasing the Property to Wawa, it had no interest in the Property. Value City was a tenant in the shopping center, and pursuant to its lease, it could reasonably withhold its consent to any development of the Property for a use other than as a bank or liquor store.[4] Problems arose when Value City refused to consent to the Wawa convenience store on the Property.

As originally executed in June 2004, the lease agreement between West Willow and Wawa (the "Wawa Lease")[5] provided that if West Willow failed to obtain certain permits and approvals within one year, either party could terminate the agreement. Third party consents were not explicitly addressed. The Wawa

[3] Wawa was referenced in the Purchase Agreement.
[4] *See West Willow*, 2007 WL 3317551, at *1-2.
[5] JX 2.

Lease was amended three times: once to give West Willow more time to secure municipal approvals; a second time in December 2005 to give Wawa more time to secure municipal approvals; and a third time around June 30, 2006, extending the approval period to December 31, 2006. A fourth amendment to the Wawa Lease was drafted, but not executed. The fourth amendment would have extended the approval period again and included a term requiring West Willow to represent and warrant that Wawa's intended use of the Property would not violate any other leases at the shopping center.[6] The Wawa Lease was structured as a triple net ground lease,[7] thus assuring a long-term and predictable cash flow.

Robino asked for Value City's consent in a letter dated July 16, 2006; Value City withheld it, but suggested it was open to negotiations. Negotiations ensued but faltered, and, on August 23, 2006, Robino's counsel sent a letter to West Willow stating that the Consent "ha[d] not been obtained."[8] The letter also stated that should West Willow choose to proceed to closing, "it must do so in light of the non-consent" and "provide an indemnification and hold harmless from any claim made or action commenced" by Value City.[9] West Willow responded on

[6] JX 4 (the amendment).
[7] In a triple net ground lease, the tenant pays the maintenance costs, property taxes, insurance, and utilities associated with a parcel, in addition to rent.
[8] JX 6.
[9] *Id.*

September 14. In that letter, it refused to agree to the indemnification and hold harmless provision and demanded that Robino either obtain the tenant's consent or agree to hold West Willow harmless. Robino recommenced negotiations with Value City, but the matter was not resolved. During this phase of the negotiations, West Willow offered to assist Robino in meeting the cost of the tenant's requested concessions, which included a new storefront. On November 6, 2006, Value City terminated negotiations and Robino informed West Willow by letter that it could not obtain the Consent.[10] West Willow did not reply to the letter, but filed this lawsuit on February 21, 2007.

By the time the third amendment to the Wawa Lease was executed, Wawa had become aware of the difficulties in obtaining the Consent. After commencement of this action, McKee continued to keep Wawa apprised of the situation, and, according to McKee, Wawa remained interested. Had the Purchase Agreement and Wawa Lease proceeded to closing, West Willow planned to sell the Property subject to the lease immediately on the "Section 1031 exchange" market.[11] There is evidence that Robino has now proposed to deal directly with Wawa.[12]

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[10] Negotiations recommenced for a little over a week before Value City terminated them again.

[11] Section 1031 of the Internal Revenue Code allows sellers of real estate to defer tax liability by acquiring like-kind property under certain conditions. *See* 26 U.S.C. § 1031.

[12] JX 8. McKee testified that Michael Stortini, a Robino principal, had told him that the Wawa Lease was too advantageous to West Willow and that, if he were made West Willow's partner, the problems with the Consent would be resolved. Tr. 11-13.

B. *The Damages Trial*

The purpose of the damages trial was to determine the Property's fair market value in light of West Willow's intended use. West Willow's damages, or the loss of the economic benefit of its bargain, would be the difference between the Property's value and the amount that West Willow would have had to pay for it if the transaction had closed. Four experts offered opinions touching on valuation and damages. West Willow offered Mark Taylor, a real estate investment professional, and Geoff Langdon, a certified public accountant. Robino presented Douglas W. McKnight, an appraiser, and John Trey Stevens, a valuation and economic analysis professional. Taylor, Langdon, and McKnight, using varying methodologies, submitted valuations ranging from $1,350,000 to $1,500,000. Stevens did not conduct a valuation, but instead opined on West Willow's mitigation opportunities.

Taylor valued the Property, subject to (and benefiting from) the Wawa Lease, assuming that West Willow would sell the Property upon acquiring it.[13] Taylor used what is known as the income capitalization or direct capitalization method, a type of valuation commonly used for Section 1031 exchange properties. The capitalization method uses the anticipated future income from a property and

[13] Taylor's report comprises JX 12 & 13.

converts it into a present value using a capitalization rate. An appropriate capitalization rate is selected based on the tenant's creditworthiness, the lease's length, the extent to which the tenant will be responsible for insurance, taxes, improvements, and operating expenses, and the location of the property. A lower capitalization rate, of course, lends to a higher valuation. Although a property's physical characteristics may inform the valuation, an income capitalization calculation is predominantly a financial analysis instead of an appraisal of the physical property.

Using the income capitalization approach, Taylor valued the Wawa Lease at two points. In September of 2005, Taylor estimated the lease fee interest at $1,499,275 using a capitalization rate of 6.9%. The capitalization rate was based on his firm's national database of closing capitalization rates, which suggested a capitalization rate between 6.75% and 7% for comparable properties with financially sound tenants.[14] Taylor testified that, although Wawa is a private entity without publicly available financial statements, it is regarded as being very strong financially. Based on this perception, Taylor adjusted the capitalization rate downward slightly. Taylor also asserted that using a national database was appropriate because Section 1031 exchange buyers dominate the market for triple net lease properties and that market is national in scope.

[14] Taylor's firm is an industry leader in the Section 1031 exchange market.

Taylor also valued the Wawa Lease again as of January 2007. By the end of 2006, the market for triple net leases had weakened, prompting Taylor to use a capitalization rate of 7.1%, which yielded a valuation of $1,408,450. The database had suggested a range of 6.75% to 7.25%.

Langdon, West Willow's second expert, valued the lease fee interest assuming that West Willow held the Property for 10 years before selling it.[15] He estimated the lease's value at $1,500,000 using a capitalization rate of 7%. Langdon selected the 7% rate based on conversations with several commercial real estate agents and published 2007 capitalization rates for improved commercial properties in Wilmington, Delaware. Those sources suggested capitalization rates of between 6% and 8.5%.[16] Langdon chose 7%, in part because it was a round number.

McKnight, Robino's valuation expert and an experienced certified real estate appraiser, estimated the value of both the undeveloped land and the land subject to the Wawa Lease as of November 2, 2006.[17] In valuing the fee and the lease interests, McKnight assumed that Value City's consent could either be obtained or was not required. McKnight estimated the fee simple interest at approximately

[15] Langdon's report appears as JX 10.
[16] Robino contends that Langdon erroneously employed a capitalization rate instead of a discount rate.
[17] McKnight's report is provided at JX 7.

$1,480,000 after conducting a comparable sales analysis focused on the Dover region and an income capitalization analysis predicated on comparable rental rates. West Willow does not challenge McKnight's valuation of the fee simple interest.

McKnight also valued the Property assuming that it was subject to the Wawa Lease using the yield capitalization method. Under this approach, he essentially calculated the sum of the discounted present value of the lease payments and the discounted present value of the reversion at the lease's termination. Using a 9% discount rate, McKnight valued the lease fee interest at $1,350,000. He selected the rate based on Wawa's perception as an above average convenience store retailer. The average discount rate was 9.55%. McKnight testified that Taylor's valuation unduly emphasized Wawa's credit, which he described as unsubstantiated beyond anecdotal evidence.

Finally, Trey Stevens, a valuation and economic analysis professional and Robino's expert, testified that West Willow has suffered no damages that could not have been avoided by adequate mitigatory measures.[18] Specifically, Stevens offered that West Willow could have either (i) refused to close and found a replacement property or (ii) proceeded to close, finding an alternate tenant or a buyer. In regard to the first course of action, the evidence as to the existence of suitable replacement was sparse and unconvincing.

[18] Stevens's report is JX 11.

C. *The Purchase Agreement's Attorneys' Fees Provision*

Paragraph 22 of the Purchase Agreement provides:

> In the event legal action is instituted by any of the parties to enforce the terms of this Agreement or arising out of the execution of this Agreement, the prevailing party will be entitled to receive from the other party or parties reasonable attorney's fees to be determined by the court in which the action is brought.

III. CONTENTIONS

The parties debate three issues touching on damages. First, West Willow asserts that breach occurred on August 23, 2006, when Robino first informed it that Value City's consent could not be obtained; Robino contends breach occurred on February 21, 2007, with the filing of this action. Second, the parties differ over the Property's value, West Willow primarily urging Taylor's opinion and Robino sponsoring McKnight's estimate. Third, Robino contends that all damages could have been avoided had West Willow engaged in adequate mitigation. In addition to these disagreements, the parties also have joined issue as to whether West Willow's attorneys' fees may be shifted to Robino under the Purchase Agreement.

IV. ANALYSIS

A. *Damages*

Before addressing the parties' specific contentions, a few words on damages generally are warranted. "[T]he standard remedy for breach of contract is based

upon the reasonable expectations of the parties *ex ante.*"[19] Damages are awarded in an amount equal to the loss in value occasioned by the defendant's non-performance.[20] Thus, the first step in determining damages is to quantify the loss suffered by the injured party.[21] Because contract damages are based on the injured party's expectation interest, the extent of the loss is determined in reference to the plaintiff's particular circumstances.[22] Second, the value of the loss must be reduced by any cost or other loss avoided by the non-breaching party. For example, a party may avoid costs by suspending its own performance when confronted with breach and avoid loss by making substitute arrangements.[23] "As a general rule, a party cannot recover damages for loss that he could have avoided by

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[19] *E.g.*, *Duncan v. Theratx, Inc.*, 775 A.2d 1019, 1022 (Del. 2001). Typically, the injured party may recover his expectation interest, as well as incidental and consequential losses, less any cost or loss avoided by virtue of not having to perform. RESTATEMENT (SECOND) OF CONTRACTS § 347 (1981), *cited with approval in Duncan*, 775 A.2d at 1022 n.6.

[20] RESTATEMENT (SECOND) OF CONTRACTS § 347.

[21] *Id.* cmt. a.

[22] *Id.* cmt. b ("[T]his requires a determination of the values of those performances to the injured party himself and not their values to some hypothetical reasonable person or on some market. They therefore depend on his own particular circumstances or those of his enterprise, unless . . . precluded by the limitation of foreseeability." (citations omitted)); E. ALLAN FARNSWORTH, CONTRACTS § 12.8 (4th ed. 2004) ("[A] party's expectation is measured by the actual worth that performance of the contract would have had to that party, not the worth that it might have had to some hypothetical reasonable person. Damages based on expectation should therefore take account of any circumstances peculiar to the situation of the injured party, including that party's own needs and opportunities, personal values, and even idiosyncrasies.").

[23] *See* RESTATEMENT (SECOND) OF CONTRACTS § 350 cmt. b; FARNSWORTH, *supra* note 22, at § 12.12

reasonable efforts."[24] Thus, the injured party has a duty to minimize, or mitigate, its costs and losses.[25]

1. The Breach Date

The Court must first determine the date Robino breached the Purchase Agreement, an issue that has implications for valuation and any potential interest accrual. West Willow argues that breach occurred on August 23, 2006, the date Robino informed West Willow that the Consent could not be obtained and asked West Willow to agree to the hold harmless provision. West Willow contends this communication constituted repudiation. Robino disagrees, arguing that breach occurred with the filing of this suit on February 21, 2007. Specifically, Robino asserts that, at the earliest, it repudiated the Purchase Agreement in November 2006, when negotiations with the tenant were terminated; that an anticipatory repudiation is transformed into breach only by the non-repudiating party's acceptance; and that West Willow did not accept the anticipatory repudiation until it filed its complaint. The Court concludes that breach occurred on February 21, 2007.

[24] RESTATEMENT (SECOND) OF CONTRACTS § 350 cmt. b

[25] *E.g.*, *Am. Gen. Corp. v. Cont'l Airlines Corp.*, 622 A.2d 1, 11 (Del. Ch. 1992). Although often described as a "duty to mitigate," the injured party is under no obligation to do so, although it will not be awarded damages for any loss that could be avoided. RESTATEMENT (SECOND) OF CONTRACTS § 350 cmt. b; FARNSWORTH, *supra* note 22, at § 12.12.

"A repudiation of a contract is an outright refusal by a party to perform a contract or its conditions."[26] Repudiation may be accomplished through words or conduct.[27] A party may repudiate an obligation through statements when its language, reasonably interpreted, indicates that it will not or cannot perform; alternatively, a party may repudiate through a voluntary and affirmative act rendering performance apparently or actually impossible.[28] In any event, repudiation must be "positive and unconditional."[29] An attempt to renegotiate terms will not constitute repudiation absent an unqualified refusal to perform unless the non-repudiating party accedes.[30]

A party confronted with repudiation may respond by (i) electing to treat the contract as terminated by breach, (ii) by lobbying the repudiating party to perform,

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[26] *PAMI-LEMB I Inc. v. EMB-NHC, L.L.C.*, 857 A.2d 998, 1014 (Del. Ch., 2004).

[27] *E.g.*, *HIFN, Inc. v. Intel Corp.*, 2007 WL 1309376, at *14 (Del. Ch. May 2, 2007); FARNSWORTH, *supra* note 22, at § 8.21. Although the concept of breach by repudiation—as opposed to breach by actual nonperformance—has been challenged, it has garnered near-universal acceptance. *E.g.*, *id.* To be cognizable, repudiation must generally involve a consequential term. *Id.* Robino has not argued that its repudiation concerned an inconsequential term. Additionally, the parties have not addressed breach outside the context of repudiation, and as a consequence, the Court declines to engage in an independent analysis of breach by nonperformance unaided by argument and instead decides the issue as framed by the parties.

[28] RESTATEMENT (SECOND) OF CONTRACTS § 250 cmts. b, c; FARNSWORTH, *supra* note 22, at § 8.21.

[29] *Carteret Bancorp, Inc. v. Home Group, Inc.*, 1988 WL 3010, at *6 (Del. Ch. Jan. 13, 1988) (quotation omitted).

[30] *HIFN, Inc.*, 2007 WL 1309376, at *14.

or (iii) by ignoring the repudiation.[31] Although perhaps counterintuitive, whether repudiation amounts to a present breach is predicated on the promisee's response.[32] Unless the non-repudiating party relies upon the repudiation or notifies the promisor that it considers the repudiation final, the promisor may retract his repudiation, thereby returning the parties to the status quo ante.[33] Once the promisee relies on the repudiation—e.g., by filing suit for damages or by engaging in a substitute transaction—or notifies the promisor it regards the repudation as final, effective retraction is no longer possible.[34]

A promisee may treat the contract as terminated in several different ways. For example, in something of a defensive posture, it may suspend its own performance when faced with repudiation,[35] in which case, no "acceptance" of repudiation is necessary.[36] If instead the promisee seeks to treat repudiation as a breach presently remediable by damages, it must manifest its decision to treat the

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[31] *E.g.*, FARNSWORTH, *supra* note 22, at § 8.22.
[32] 23 RICHARD A. LORD, WILLISTON ON CONTRACTS § 63:51 (4th ed. 2007) ("The concept that a breach of contract results from something the promisee does is . . . foreign to the notions, not only of lawyers, but of businesspeople . . . ."); *see Carteret Bancorp, Inc.*, 1988 WL 3010, at *6.
[33] *Carteret Bancorp, Inc.*, 1988 WL 3010, at *6.
[34] *Id.* (stating that this is so because the parties will not be able to be returned to their original positions); RESTATEMENT (SECOND) OF CONTRACTS § 256; FARNSWORTH, *supra* note 22, at § 8.22.
[35] FARNSWORTH, *supra* note 22, § 8.22; WILLISTON ON CONTRACTS, *supra* note 32, at § 63:51.
[36] WILLISTON ON CONTRACTS, *supra* note 32, at § 63:51.

contract as terminated.[37] One way this may be accomplished is by filing suit for money damages.[38]

Alternatively, the non-repudiating party may lobby for performance. The promisee may urge performance extrajudicially, and if the promisor fails to retract its repudiation, the promisee may consider the contract terminated as though it never sought retraction.[39] A party may urge performance of the contract judicially by suing for specific performance:

> A suit seeking specific performance is, however, in effect, an assertion not that the promisee elects to finalize the breach claimed and calculate his damages now, but rather that the promisee treats the mutual obligations as being still in force. Where the promisee does so, there is no purpose to be served by treating the filing of suit as cutting off the promisor's power to retract . . . .[40]

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[37] Although it has been said that repudiation may be "treated as an actual breach or as amounting to a tender of a breach," 17B C.J.S. *Contracts* § 534 (1999) (footnote omitted), the better view is that: "a repudiation ripens into a breach prior to the time for performance only if the promisee 'elects to treat it as such,'" *Franconia Assocs. v. United States*, 536 U.S. 129, 143 (2002) (quoting *Roehm v. Horst*, 178 U.S. 1, 13 (1900)). *See also* WILLISTON ON CONTRACTS, *supra* note 32, at § 63:51 ("[Repudiation] is not in itself and unless acted on by the promisee a breach of contract. . . . Such declaration only becomes a wrongful act if the promisee elects to treat it as such.") (internal quotation marks omitted and second alteration in original); *id.* § 62:52 ("Under the doctrine of anticipatory breach as stated by many courts, a manifestation of election is said to be necessary in order to constitute a breach . . . ."); FARNSWORTH, *supra* note 22, at § 8.22 (stating that injured party may choose how to treat repudiation).

[38] *Cochran v. Denton*, 1991 WL 220547, at *1 (Del. Ch. Oct. 28, 1991); *Carteret Bancorp, Inc.*, 1988 WL 3010, at *6; *accord Franconia Assocs.*, 536 U.S. at 143. Any act manifesting the non-repudiating party's intention to terminate the contract will suffice. *See, e.g.*, *Bu-Vi-Bar Petroleum Corp. v. Krow*, 40 F.2d 488, 493 (10th Cir. 1930) ("A change of position by the latter manifesting such election is sufficient, and notice of election to treat the repudiation as a breach is not necessary."); 17B C.J.S. *Contracts* § 534 ("[I]t is not necessary that he or she bring an action at once, but he or she may evidence his or her election by other acts.").

[39] RESTATEMENT (SECOND) OF CONTRACTS § 256; FARNSWORTH, *supra* note 22, at § 8.22.

[40] *Carteret Bancorp, Inc.*, 1988 WL 3010, at *6; *accord Nat'l R.R. Passenger Corp. v. Expresstrak, L.L.C.*, 2006 WL 2947558, at *8 (D.D.C. Oct. 16, 2006).

Finally, the non-repudiating party may ignore the repudiation. This response hazards retraction at any point up until the time for performance has passed.[41]

In the instant matter, Robino repudiated its obligation to secure Value City's consent twice. In its August 23, 2006, letter to West Willow, Robino stated that if West Willow elected to proceed to closing, it would be forced to do so "in light of the non-consent." Additionally, even if West Willow chose to close, Robino demanded that it agree to the hold harmless provision. With these statements, Robino positively and unconditionally expressed its intention not to perform, as well as its unwillingness to close without West Willow's agreement to different terms. Accordingly, the first instance of repudiation occurred on August 23, 2006.

Later, however, Robino effectively retracted this first repudiation. West Willow urged performance in its September 14, 2006, letter, demanding that Robino obtain the Consent. Robino then resumed negotiations with Value City and kept West Willow abreast of its progress. Not only was West Willow aware of the negotiations, it even offered to share some of the cost of potential concessions to Value City. As a consequence, West Willow cannot be said to have accepted this first repudiation or materially changed its position by relying upon it.

Robino again repudiated its obligation on November 6, 2006. On that date, it informed West Willow that negotiations had been unsuccessful and that West

[41] FARNSWORTH, *supra* note 22, at § 8.22.

Willow should choose to either terminate the Purchase Agreement or proceed at its own risk. West Willow did not respond to the repudiation directly, choosing instead to file suit on February 21, 2007. Although West Willow sought relief primarily in the form of specific performance, it also included a prayer for damages in its complaint. More importantly, Robino has conceded that breach (if, indeed, breach ever occurred) would have occurred with the commencement of litigation, thus, relieving the Court from considering what effect, if any, the requested forms of relief may have had on determining the date of breach. Accordingly, breach occurred on February 21, 2007.

2. The Property's Fair Market Value

Turning to the Property's value, West Willow relies upon the opinions of its experts, particularly Taylor. It argues that Taylor has been involved in brokering the sale of convenience stores, including a Wawa in 2007, and that the capitalization rate method he utilized is particularly well-suited to 1031 exchange properties. In response, Robino contends that neither Taylor nor Langdon is a certified appraiser and that neither purported to follow any nationally recognized guidelines.[42] Robino also offers that Taylor's report used an unjustifiably low

[42] Robino argues that being an certified appraiser is not only an indicium of credibility, but that it is required under 24 *Del. C.* § 4007 ("No person . . . shall hold himself . . . out . . . as being qualified to act as a real estate appraiser . . . , or engage in the practice of appraising or assume to act as an appraiser . . . unless such person has been duly certified or licensed under this chapter."). Because the Court ultimately accepts the valuation proposed by a certified appraisal, a definitive resolution of this argument is not necessary. Although this is certainly a dispute

capitalization rate based on an unsubstantiated perception of Wawa's creditworthiness; that the report's "comparables" data did not include lease statistics for Dover or Delaware; and that it failed to include statistical analysis on the comparables data. Robino attacks Langdon's report, citing that he has no particular experience in real estate valuations and that he inappropriately used a capitalization rate instead of a discount rate, and even this rate was chosen based on anecdotal data and for convenience.

Robino recommends the valuation of its expert, McKnight, submitting that he is a certified appraiser; that his report undertook a comprehensive analysis of the Wawa Lease and the Dover market and used an appropriate discount rate; and that he was the only expert who appropriately factored the Wawa Lease's renewal provisions into his valuation. West Willow counters that McKnight's valuation used a later date, November 2, 2007, that likely depressed his estimate given deteriorating market conditions. It also argues that McKnight's approach did not adequately account for the probable Section 1031 exchange nature of any eventual

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about real estate and its valuation, the parties have principally directed their efforts to how the Wawa Lease would be valued in the Section 1031 market, which, again, although dealing with real estate, is, in essence, a market for financial instruments—the triple net leases—which are valued, not by reference to underlying real property, but by applying familiar financial valuation methodologies. That focus necessarily is on the cash flow and the risk of default by the tenant. In substance, the experts have valued the Wawa Lease substantially by treating it as a debt instrument by reducing its future cash flows to present value. In short, given the way this litigation has evolved, the debate has centered on a valuation of that cash flow, with its attendant risks, and not on the underlying value of a parcel of real estate.

sale and that his analysis, unlike Taylor's, was not convenience store specific.

To resolve the parties' debate, the Court is tasked with weighing the experts' testimony.[43] The Court concludes that the lease fee interest is the appropriate measure of value. West Willow intended to lease the property to Wawa and had even negotiated a lease agreement with rent schedules. Although the Wawa Lease may have reflected rental rates that were below average, there is no question that West Willow aimed to close on the Property, lease it pursuant to the Wawa Lease, and sell it quickly on the Section 1031 exchange market. Thus, the Court need not consider McKnight's fee simple valuation of $1,480,000; West Willow simply did not intend to sell the property unencumbered.[44]

Accordingly, the Court turns to the valuations of the lease fee interest. Confronted with McKnight's and Taylor's more detailed studies of capitalization rates, the Court declines to rely on Langdon's valuation of $1,500,000, which may have been more informative under different circumstances in which the anecdotal information might have been entitled to greater weight. Both McKnight's and Taylor's estimates fix the value of the Property within a relatively narrow range. Because breach occurred on February 21, 2007, the Court will consider Taylor's

[43] *See Ala. By-Products Corp. v. Neal*, 588 A.2d 255, 259 (Del. 1991); *Lillis v. AT&T Corp.*, 2007 WL 2110587, at *20 (Del. Ch. July 20, 2007).
[44] *See supra* note 19 and accompanying text.

January 2007 valuation of $1,408,450 instead of his September 2005 valuation of $1,499,275. McKnight valued the lease fee interest at $1,350,000,[45] leaving only a $58,450 difference between the two calculations.

McKnight and Taylor are both experienced real estate professionals, and each conducted a helpful analysis; ultimately, however, McKnight's assessment is more persuasive. McKnight employed a discounted cash flow analysis, using a discount rate of 9.0% based upon a third quarter 2007 average discount rate of 9.55%.[46] Given Wawa's strong reputation, McKnight departed somewhat from the average rate, although he declined to adjust the rate substantially without more information on Wawa's credit rating. This approach was sound; Taylor's selection of a capitalization rate below that of some investment grade rated tenants was more aggressive and likely overstated, if only minimally, the closing capitalization rate that a 1031 buyer would be willing to pay for the Property.[47] Additionally, although Taylor assumed Wawa would lease the Property for only ten years, McKnight assumed, tenably given its plan to build a structure, that Wawa would likely renew its lease at least beyond the initial term. McKnight valued the Property as of some eight months after the breach date, but West Willow has

[45] Tr. 115.
[46] McKnight drew this average discount rate from the entire market, which includes the Section 1031 exchange market.
[47] West Willow has no major dispute with McKnight's fee simple valuation of the Property. *See* Pl.'s Reply Br. at 6; Tr. 55-56.

presented no persuasive evidence that his valuation would have differed meaningfully had it been conducted as of the date of breach. Consequently, the Court finds that the fair market value of the Property as it was intended to be used by West Willow was $1,350,000 as of the date of the breach.

3. Mitigation

Having determined the Property's market value, the Court now considers Robino's contention that West Willow is not entitled to damages because it failed to take adequate mitigative action. Based on Stevens's opinion, Robino argues that West Willow could have mitigated its damages with minimal risk and cost either (i) by refusing to close and seeking a replacement property or (ii) by proceeding to closing and either finding an alternate tenant or selling the Property to another buyer. West Willow disagrees; it argues that these courses of action would have exposed it to unreasonable risks. Further, West Willow offers that it did take reasonable mitigation measures by negotiating extensions to the Wawa Lease, offering to contribute to the cost of the contemplated concessions to Value City, promptly pursing relief, and keeping Wawa apprised of the situation and interested in going forward with the lease.

A non-breaching party need not hazard undue risk, burden, or humiliation in mitigating costs and damages.[48] Mitigation is subject to a rule of reasonableness, and whether a loss is mitigable turns on the circumstances.[49] As the Third Circuit has explained,

> The rule of mitigation . . . may not be invoked by a contract breaker as a basis for hypercritical examination of the conduct of the injured party, or merely for the purpose of showing that the injured person might have taken steps which seemed wiser or would have been more advantageous to the defaulter. One is not obligated to exalt the interest of the defaulter to his own probable detriment.[50]

Further, if the injured party takes reasonable, but unsuccessful, steps to limit costs and losses, recovery is permissible.[51]

Contrary to Robino's assertions, by renegotiating the Wawa Lease and offering to contribute to the cost of concessions to Value City, West Willow did take reasonable, although unsuccessful, steps to mitigate and is therefore entitled to the full value of its expectation interest. Requiring West Willow to "cover" by purchasing a replacement property would be inappropriate considering Wawa's demonstrated interest in the Property and the questionable availability of similar properties that it may have found suitable. The unique nature of real property also

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[48] RESTATEMENT (SECOND) OF CONTRACTS § 350, *quoted in Duncan*, 775 A.2d at 1022 n.6.
[49] *Lynch v. Vickers Energy Corp.*, 429 A.2d 497, 504 (Del. 1981), *overruled on other grounds by Weinberger v. UOP, Inc.* 457 A.2d 701, 703-04 (Del.1983).
[50] *In re Kellett Aircraft Corp.*, 186 F.2d 197, 199-200 (3d Cir. 1950) (footnote omitted).
[51] RESTATEMENT (SECOND) OF CONTRACTS § 350(2).

supports this conclusion.[52] The Court cannot accept Robino's contention that West Willow should have proceeded to close on the Property, agreeing to hold Robino harmless. Such a course of action would have been fraught with risk. There is no indication that the Consent would have been forthcoming, and Wawa would not have entered the lease without it. Also, given the consent restriction, it is doubtful West Willow would have found a suitable replacement tenant.[53] Finally, in light of West Willow's desire to sell the Property quickly after acquiring it, Value City's non-consent would have complicated any potential sale and likely would have reduced any price that could have been obtained.

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It follows that West Willow is entitled to damages in the amount of $625,000. This is the difference between the Property's value as if conveyed subject to the Wawa Lease ($1,350,000) and the purchase price established by the Purchase Agreement ($725,000).[54] Interest on that amount shall accrue at the legal rate from the date of the breach, February 21, 2007.[55]

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[52] *E.g.*, *Szambelak v. Tsipouras*, 2007 WL 4179315, at *7 (Del. Ch. Nov. 19, 2007) ("Real property is unique.").

[53] *See supra* text accompanying note 4.

[54] Of course, to close on the Property, West Willow's total outlay would have been more than that in order to cover closing costs and related expenses. No proof of any additional costs was offered and the parties seem to agree that the appropriate West Willow acquisition cost under the Purchase Agreement is $725,000. *See* Tr. 7.

[55] *See, e.g.*, *Boyer v. Wilmington Materials, Inc.*, 754 A.2d 881, 909 (Del. Ch. 1999). Robino does not contend that the legal rate is inappropriate.

B. *Attorneys' Fees*

Finally, West Willow seeks its attorneys' fees in prosecuting this action pursuant to the Purchase Agreement. West Willow argues that it prevailed in the liability phase of this litigation and is therefore entitled to its fees under this clause. Robino answers that West Willow brought this action seeking specific performance, and, having failed to demonstrate the appropriateness of that remedy, West Willow cannot be considered to have prevailed.

Delaware generally follows the American Rule under which each party is obligated to pay its own attorneys' fees regardless of the outcome;[56] however, where the parties have determined the allocation of fees by private ordering, departure from this general rule and deference to their agreement are warranted.[57] Absent any qualifying language that fees are to be awarded claim-by-claim or on some other partial basis, a contractual provision entitling the prevailing party to fees will usually be applied in an all-or-nothing manner.[58] This Court has typically

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[56] *E.g.*, *Goodrich v. E.F. Hutton Group, Inc.*, 681 A.2d 1039, 1044 (Del. 1996).

[57] *E.g.*, *Dittrick v. Chalfant*, 2007 WL 1378346, at *1 (Del. Ch. May 8, 2007) (discussing that this departure is proper because an attorneys' fees clause may have induced a party's assent); *AHS N.M. Holdings, Inc. v. Healthsource, Inc.*, 2007 WL 431051, at *9 (Del. Ch. Feb. 2, 2007) ("Delaware courts routinely enforce contract provisions allocating costs of legal actions arising from the breach of contract."); *Comrie v. Enterasys Networks, Inc.*, 2004 WL 936505 (Del. Ch. Apr. 27, 2004) (applying contractual provision); *Brandin v. Gottlieb*, 2000 WL 1005954, at *26-28 (Del. Ch. July 13, 2000) (same); *Knight v. Grinnage*, 1997 WL 633299, at *3 (Del. Ch. Oct. 7, 1997) (emphasizing freedom of contract).

[58] *Comrie*, 2004 WL 936505, at *2; *accord Brandin*, 2000 WL 1005954, at *27-28. Although this Court has expressed some reservation over the bluntness of this approach, *Brandin*, 2000 WL 1005954, at *27-28, it has nevertheless respected the parties' contractual intent, *see supra* note 58 (citing cases).

looked to the substance of a litigation to determine which party predominated.[59] In some instances—for example, where a court grants neither party's cross-motion for summary judgment—no party may be regarded as having prevailed.[60] Additionally, considerations of justice and equity may inform the analysis.[61]

Based on these principles, the Court concludes that West Willow is entitled to its reasonable fees under Paragraph 22 of the Purchase Agreement. That paragraph provides that "[i]n the event legal action is instituted . . . the prevailing party will be entitled to . . . reasonable attorney's fees." Whether West Willow is entitled to fees reasonably incurred will be determined in reference to the litigation as a whole because the clause only contemplates awarding fees to the prevailing party in an "action." There can be no question West Willow prevailed in this matter. It prevailed on the substantive breach of contract claim. It sought both specific performance and, alternatively, damages. While Robino is correct that West Willow was unsuccessful in its efforts to obtain specific performance, *Comrie v. Enterasys Networks, Inc.* makes clear that, in the usual case, whether a party prevailed is determined by reference to substantive issues, not damages.[62] In

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[59] *E.g.*, *Comrie*, 2004 WL 936505, at *2-3; *Brandin*, 2000 WL 1005954, at *26-27.
[60] *See AHS N.M. Holdings, Inc.*, 2007 WL 431051.
[61] *Dittrick*, 2007 WL 1378346, at *2 (citing *Council of the Dorset Condo. Apts. v. Gordon*, 2002 WL 1335620, at *1-2 (Del. Ch. June 14, 2002)).
[62] 2004 WL 936505, at *2-3. In *Comrie*, the plaintiffs had also sought specific performance, as well as $4,620,000 in monetary damages. *Id.* at *2. They were ultimately awarded only $1,309,991. *Id.* Of course, one may envision circumstances where predomination may be predicated on a remedy determination.

Comrie, as here, damages were an issue subsidiary to contract interpretation.[63] That the Court considered the primary issues in the liability phase of this matter to be ascertaining the scope of Robino's obligations under the Purchase Agreement and determining the suitability of specific performance does not alter this result.[64] As in *Comrie*, the crux of this case was the Court's conclusion that Robino was unconditionally obligated to secure the Consent; the form and extent of the remedy were important but decidedly secondary issues. Thus, because West Willow prevailed on the litigation's chief issue—the proper interpretation of the Purchase Agreement, it is entitled to its reasonable fees.

V. CONCLUSION

For the foregoing reasons, West Willow is awarded damages in the amount of $625,000, with interest accruing at the legal rate from the date of the breach. West Willow is also entitled to its reasonable attorneys' fees.

Counsel are requested to confer and to submit an implementing form of order.

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[63] *Id.* at *3 ("[T]he plaintiffs were predominate in the main issue in the case—the interpretation of the Agreement. The remedy, a determination of damages, was based on this interpretation.").
[64] *West Willow-Bay Court, LLC*, 2007 WL 3317551, at *1.